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IN THE

Supreme Court of the United States

No. 84. OCTOBER TERM, 1933.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, Appellant,

v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

REPLY TO BRIEF FOR APPELLEES.

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REPLY TO BRIEF FOR APPELLEES.

The point that Appellant had failed to exhaust its administrative remedy in the State Courts was not raised by defendants in their answer in the Court below; nor was it raised in the oral argument or in defendants' brief in the Lower Court or considered by the Lower Court. Indeed, the Lower Court in its opinion (R. 44, l. 9) specifically referred to the possible proceedings in the State Court as a *"judicial determination."* It was first urged by Appellees in their brief filed on November 6, three days before the argument in this Court. Leave was accordingly asked to file the present supplemental brief to enable Appellant to discuss the principle of *Porter* v. *Investors Syndicate, 286 U. S. 461,* relied on in Appellees' brief, and *Prentis* v. *Atlantic Coast Line Co., 211 U. S. 210,* the leading case on which the Porter case is based, Appellees' new position being that the appeal allowed by Pennsylvania law from the action by the Department of Revenue to the Dauphin County Court constituted an administrative remedy which Appellant had failed to pursue before resorting to the Federal Court.

In quoting, in part, the Pennsylvania Statute on page 10 of Appellees' brief, in support of their contention that the proceedings are *"de novo,"* Appellees fail to state that the right of appeal is confined to the taxpayer. They characterize as immaterial and omit from their quotation of the language of the Act

the provision which expressly confines the consideration of the Dauphin County Court to the *objections* specified in the appeal from the appraisement. The provision is as follows:

> "§1202a. APPEAL TO COMMON PLEAS OF DAUPHIN COUNTY; OBJECTIONS TO APPRAISEMENT TO BE SPECIFIED
>
> Any person not satisfied with such appraisement as made by an appraiser appointed by the Auditor General may appeal, within thirty days, to the court of common pleas of Dauphin County, on paying or giving security to pay all costs, together with whatever tax shall be fixed by the court. *The appeal shall specify all the objections to said appraisement, and any objections not specified in the appeal shall not be considered by the court.* Upon such appeal, the court may determine all questions of valuation and the liability of the appraised estate for such tax, subject to the right of appeal to the Supreme or Superior Court. (1919, June 20, P. L. 521, §27, as amended 1931, June 22, P. L. 689, §2.)" (P. S. Sec. 1202a, p. 18 of 1932 Supplement.) (Italics ours.)

Clearly, under this provision requiring the bond to cover the tax, only the taxpayer can appeal. Clearly, also, the provision confining the questions on appeal to those specified in the objections specified by the appellant negative the conclusion that the proceeding is in all respects *de novo*.*

* The Court's function is merely to decide whether or not the valuation fixed by the Revenue Department is excessive. Com. v. Manor Gas Coal Co., 2 Dauph. Co. (Pa.) 121.

Apparently, also, appeals from the appraisement of taxes are regarded by the Pennsylvania Courts and Legislature as civil cases to which Article I, section 6 of the Pennsylvania Constitution, requiring jury trials in all civil cases, is applicable. (See, for example, *Com.* v. *Hudson Coal Co., 28 Dauph. Co. 245,* relative to anthracite coal tax.) Certainly a proceeding involving a jury trial is a judicial one.

The foregoing considerations support the conclusion that on appeal to the Dauphin County Court, that Court exercises judicial and not legislative or administrative functions.

The function of the Dauphin County Court in these tax appeals is confined to the determination of a liability on account of past events. It cannot be called upon to prescribe rules for future conduct. Applying the test laid down in *Prentis* v. *Atlantic Coast Line Co., 211 U. S. 210, 226,* for the determination of when a tribunal is exercising judicial functions, the Dauphin County Court "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." It does not purport to make "a rule for the future."

Nor, as in *Porter* v. *Investors Syndicate, 286 U. S. 461,* is the Dauphin County Court called on to make an order defining the conditions on which the appellant in a tax case shall be permitted to exercise privileges *in the future.* All that the Dauphin County Court is empowered to decide is how much, if any-

thing, this Appellant owes the State, under existing laws, on account of decedent's death, in the past, owning certain specific property.

Attention is called to the essential distinction between the determination of a valuation to be used as the basis for the allowance of future rates, and cases like the present where the valuation is to be the basis only of a present liability for an obligation based on accomplished facts.

Irrespective, however, of whether or not, when the Dauphin County Court is called on to approve or reduce the valuation fixed by the Revenue Department, it might be said to exercise administrative functions, it is clear that it cannot be called upon to exercise any such functions *in the case at bar,* since there is no dispute as to the valuation of the paintings here involved (see par. 7 of the Bill and Answer, R. pp. 4 and 35).

In *Prentis* v. *Atlantic Coast Line Co., 211 U. S. 210,* this Court pointed out clearly at page 226 that in cases of this kind the "question depends not upon the character of the body but upon the character of the proceedings." It matters not what may be the functions of the court in some other case, but only what they may be in the particular case under consideration. The fact that a court is empowered to grant liquor licenses or to prescribe Rules of Court or to pass on the qualifications of the lawyers seeking to practice before it does not affect the character of its purely judicial functions.

The *Prentis* case was an appeal by the Virginia Railroad Commission, defendant below, from a decree of the Circuit Court overruling a demurrer by defendant to a bill filed by the railroad to enjoin the enforcement of a schedule of passenger fares alleged to be confiscatory. The rates in question were to operate for the future. This Court found that the Commission's functions were both legislative and judicial, and that if it were here exercising judicial functions the United States Courts would be powerless to interfere with it. This Court said, however (p. 226):

> "Proceedings legislative in nature are not proceedings in a court within the meaning of Rev. Stats. §720, no matter what may be the general or dominant character of the body in which they may take place. *Southern Ry. Co.* v. *Greensboro Ice & Coal Co., 134 Fed. Rep. 82, 94,* affirmed *sub nom. McNeill* v. *Southern Ry. Co., 202 U. S. 543.* That question depends not upon the character of the body but upon the character of the proceedings. *Ex parte Virginia, 100 U. S. 339, 348.* * * *"

The basis for the decision and the essential difference between it and the case at bar is found in this Court's distinction of the Prentis case from that in *McNeill* v. *Southern Ry. Co., 202 U. S. 543,* as follows (p. 231):

> "It is proper before closing to mention one decision that was relied upon by the appellees, and one or two other matters peculiar to the

cases before the court. In *McNeill v. Southern Ry. Co., 202 U. S. 543*, the same moment was selected for bringing suit as in these cases, while an examination of the laws of North Carolina discloses that there were statutory provisions for appeal somewhat similar to those in the Virginia constitution, to which we now are referring. But, apart from other differences, *in that case the ground of the decree was that the state commission was dealing with a subject-matter beyond its power; no regulation would have been valid, 202 U. S. 561, and the considerations to which we now are giving weight naturally were not urged.* * * *" (Italics ours.)

This Court there clearly implies that if the question had been not as to whether, under the facts, the rates were fixed at a figure which was confiscatory, but whether the Commission had no power to fix *any* rates, the decision would have been different.

The Prentis case, therefore, for the purposes of the present discussion, is authority for two essential propositions: *first*, that the inquiry in cases of this nature is as to the nature of the functions which the tribunal is *then exercising*, and not as to the powers and functions which theoretically it *might have* but was *not then actually exercising; second*, that where the inquiry is as to whether the body is dealing with a subject-matter beyond its power, it is unimportant that an appeal may be had to a higher state tribunal which, if the first tribunal is without power, will be equally powerless. Since, in the case at bar, the only

question at issue is as to the constitutional power of the State to exact *any tax at all*, there can be no question as to the exercise of legislative or administrative functions. An examination of all the decisions of this Court in which *Prentis* v. *Atlantic Coast Line Co., 211 U. S. 210*, has been cited, fails to disclose any in which the principle of that decision, requiring the exhaustion of the local legislative and administrative remedies before resorting to the Federal Court, has ever been applied to a proceeding in a State tribunal involving solely the determination of the constitutional right of State Officials, under the circumstances stated, to exact any tax at all.

The mere fact that the present bill was brought before the tax in question had been actually assessed does not make the present bill premature. In *Risty* v. *Chicago, R. I. & Pac. Ry. Co., 270 U. S. 378, 388*, this Court said (p. 388):

> "* * * As the principal ground for appellees' suits was the invalidity of the whole proceeding and not merely inequality in apportionment of benefits, and as the effect of the proposed equalization would have been to bring the lands of appellees into the newly established drainage district and subject them to *future assessment* for construction costs and for maintenance, *the threatened injury was imminent and the suits were not premature.* The assessment, if made, would have established a lien on the appellees' property which would be a cloud on title—to say nothing of the fact that the effect of the pending proceeding would have been to subject

> their property to future assessments; hence the case was one for equitable relief unless there was a plain and adequate remedy at law. * * *"
> (Italics ours.)

See also *Chicago G. W. Ry.* v. *Kendall, 266 U. S. 94.*

In *Porter* v. *Investors Syndicate, 286 U. S. 461,* the question was as to whether or not the State officer had exercised a proper administrative discretion in revoking Appellant's Blue Sky permit, which of course the State officer had power to revoke for proper cause and in a proper manner. In the case at bar, under the facts admitted by the State officials, they had no power or jurisdiction to impose *any* tax on this property, since under the decisions of this Court it was not within their jurisdiction. *Our objection is not to an excessive valuation, but to the imposition of any tax at all.*

The only question in this controversy is as to whether the State will persist in its attempt to impose *any* tax on this property. This has been settled by Attorney General Schnader, who is the final executive authority in Pennsylvania as to the purpose of the State in attempting to collect the tax. The question was referred to him by the Department of Revenue for decision (par. 19 of Bill, Rec. p. 9, and par. 19 of Answer, Rec. p. 37), and he decided that State authorities would persist in their attempt to collect the tax and

so advised the Executors (par. 22 of Bill and Answer, Rec. pp. 9-10 and 38). Irrespective of what might be the functions of the Dauphin County Court in some other case, its function in this case can be only and purely judicial, since the only question for it to decide would be as to the constitutional power of Pennsylvania to exact any tax at all on account of the transfer from this New York decedent of this particular property.

In Porter *v.* Investors Syndicate, 286 U. S. 461, 471, Mr. Justice Roberts said, in the course of the opinion:

> "The present case is not one in which the review of the commissioner's action is judicial in character. If it were, the authorities cited by appellee which hold that one competent to invoke the jurisdiction of the federal courts is not bound to pursue a judicial review in the state courts would apply. See *Bacon* v. *Rutland R. Co., 232 U. S. 134; Prendergast* v. *New York Tel. Co., 262 U. S. 43; Railroad Commission* v. *Duluth St. Ry. Co., 273 U. S. 625.* * * *"

The present case is distinguishable from that case on a further ground. On page 469, the Court said:

> "But we are told that the commissioner asserted his intention to enforce the order, and that the statute forbids the state court to afford interlocutory relief. Thus, says the appellee, though trial might result in a decision vacating the com-

missioner's order, *in the interval irreparable harm would have been done* by the revocation of the company's permit, and its officers and agents rendered liable to criminal prosecution. Such a state of the law, it is insisted, amounts to a denial of due process to which one confronted with the possible loss of property is not bound to submit but may at once, if there be the requisite diversity of citizenship and amount in controversy, apply to a federal court for relief. *Conceding the correctness of the premises, the conclusion is sound.* Pacific Telephone Co. *v.* Kuykendall, 265 U. S. 196. * * *" (Italics ours.)

The Court then went on to hold that, under the Statutes of Montana, plaintiff was entitled, upon a proper showing, to obtain a stay, and that therefore irreparable injury to complainant did not appear.

In the case at bar irreparable injury is threatened in the existence of the lien;* in the expense

* In connection with Mr. Schnader's statement at the oral argument that there was no lien for inheritance taxes, under Pennsylvania Law, we quote the Statute (72 P. S. § 1401):

"§ 1401. Liens of Taxes, Interest, Penalties, and Other Accounts Due to the Commonwealth

All State taxes imposed under the authority of any law of this Commonwealth, now existing or that may hereafter be enacted, and unpaid bonus, interest, penalties, and all public accounts settled against any corporation, association, or person, shall be a first lien upon the franchises and property, both real and personal, of such corporation, association, or person, from the date of settlement, and whenever the franchises or property of a corporation, association, or person, shall be sold at a judicial sale, all taxes, interest, bonus, penalties, and public accounts, due the Commonwealth, shall first be allowed and paid out of the proceeds of such sale, before any judgment, mortgage, or any other claim or lien against such corporation, association, or person, *but the lien of transfer inheritance taxes shall be limited to the property chargeable therewith, and, unless such taxes shall be sued for within five years after they are due, they shall cease to be a lien as against any purchaser of real estate.* (1929, April 9, P. L. 343, art. XIV, § 1401.)" (Italics ours.)

of the bond (not merely for costs, but for the tax also), for which Appellant will have no redress even if he is successful; in the damage from the delay in assessing the tax, which Appellant is powerless to expedite; and in the serious risk of losing the 80% credit on the Federal tax, if the final decision on the liability for the Pennsylvania tax is too long delayed (see pp. 17-23 of our principal Brief).

If the present contention of the Appellees is sound, at what point can this New York citizen avail himself of his Federal right to have determined by the Federal Court his constitutional right to immunity from taxation by Pennsylvania?

The taxpayer in this case is not bound to come to the Federal Court with the facts found against him. *Chicago, B. & Q. R. R.* v. *Osborne, 265 U. S. 14.*

In *R. R. Com.* v. *Duluth St. Ry., 273 U. S. 625, 628,* this Court said:

> "* * * *it must be remembered that the requirement that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity.* Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the State Court when at least it is possible that as we have said it would find itself too late if it afterwards went to the District Court of the United States. *Pacific Telephone & Telegraph Co.* v. *Kuykendall, 265*

U. S. 196. Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290." (Italics ours.)

It is therefore respectfully submitted:

First: That the functions of the Dauphin County Court in hearing appeals from the State Appraisers, being confined to the determination of the amount of the tax due on account of past events and not involving the power to fix a valuation to be used as the basis for the exercise of a future right, are essentially judicial.

Second: That the question is not as to the general powers of the Dauphin County Court in all cases, or even in all cases arising on tax appeals, but as to the powers and functions which may be exercised by that Court in this particular case. The sole question for the determination either of the Dauphin County Court or of the Federal Courts in this case is the power of the State of Pennsylvania, under the Constitution of the United States, to exact inheritance tax from the estate of a New York decedent, on specific property, under undisputed facts. No more purely judicial question than this could well be imagined.

Third: That even if the possible appeal to the Dauphin County Court were considered as a quasi-legislative or administrative remedy, nevertheless Appellant, being confronted with irreparable injury incident to an appeal to the Dauphin County Court,

was not bound to submit to possible loss therefrom, but had the right at once, there being the requisite diversity of citizenship and amount in controversy, to apply to the Federal Court for relief.

Respectfully submitted,

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